Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

NO. 79–1764

* * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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Respondent, JOYCE ANN BURDINE, respectfully prays that a writ of certiorari be denied to the review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 17, 1979, with rehearing denied on March 10, 1980.

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that when the Defendant in a Title VII case is required to articulate a legitimate, nondiscriminatory reason for an employment decision that it must prove the reason by legally sufficient proof rather than merely stating fictitions or unsupported reasons for its actions.

2. Whether the Court of Appeals may make an independent review of a finding on nondiscrimination by the Trial Court or whether it must follow the clearly erroneous standard.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's rendition of the facts but would add and clarify as follows:

Respondent had several years of experience in manpower programs while both males, WALZ and WATTS, had very little previous experience.

Respondent was not given a promotion or increase in pay from the period between November 1972 and April 1973 although she was given additional responsibilities and duties.

Respondent clearly expressed her desire, both orally and in writing, to remain in the program after the reorganization.

The Department of Labor made no requirements as to who the new personnel in the program should be.

Respondent was never interviewed for the Project Director position, or for any other position to be created after the reorganization; the male, WATTS, was transferred from another division contrary to a written personnel policy that stated a preference toward promotion of division employees over transfers from another division; the positions were not placed for bids as required by personnel policy; and the agency director personally recruited the male WATTS for the job of Project Director.

There was only one female Project Director out of eleven (.09%) even though the agency itself was comprised of forty-four (44%) percent females.

Although the agency director, FULLER, testified that he believed that Respondent was responsible for inadequacies in the program and dissension among staff members, absolutely no evidence was introduced to support this assertion.

Respondent filed suit alleging sex discrimination (1) in her termination and non-promotion in favor of WATTS; (2) in her termination and the retention of WALZ; and, (3) in unequal pay for performing the Project Director duties from November 1972 to April 1973 at no increase in pay. Plaintiff also requested reasonable attorney's fees. The United States District Court for the Western District of Texas, Austin Division, denied relief on all counts. The Court of Appeals for the Fifth Circuit affirmed the lower Court's ruling regarding WATTS, reversed regarding WALZ, remanded for further findings regarding the unequal pay claim and remanded for reasonable attorney's fees. From that decision and the denial of a petition for rehearing, the Petitioner seeks a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

The trial court made no express finding as to whether a prima facie case of discrimination was shown under the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, the Court of Appeals found that a prima facie case was proven and Petitioner has not challenged this finding. Petitioner also admits that, under the Green test, once a prima facie case is shown, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. However, Petitioner takes issue with the standard of proof necessary by the employer in articulating this legitimate, nondiscriminatory reason as set forth by the Court of Appeals. The Fifth Circuit Court of Appeals has clearly held prior to the instant case that the employer must prove a legitimate, nondiscriminatory reason by a preponderance of the evidence, and that "articulate" means to prove by legally sufficient evidence. Turner v. Texas Instruments, 555 F.2d 1251, 1255 (5th Cir. 1977). If the employee meets this burden, the burden then shifts back to the Plaintiff to show that such reason(s) was merely pretextual. Petitioner asserts that this standard as set forth here and in Turner is in conflict with this Court's rulings in Furnco Construction Company v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Petitioner contends that it is only necessary for the employer to state a reason for its conduct, regardless of whether there is any evidence to support it.

Here, the Court of Appeals spoke directly to this alleged conflict and rejected it. The Court of Appeals stated that Sweeney merely held that an employer is not required to prove the absence of a discriminatory motive; however, this does not mean that no evidence other than the bald assertion of a reason by the employer is sufficient to rebut the prima facie case. The Court of Appeals stated in Turner that:

> "To rule otherwise would unduly limit a Plaintiff's opportunity to respond to an employer's articulation of reasons. If an employer need only articulate—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions.... and the Plaintiff would find himself attempting to prove that a reason without factual foundation—presumed true—was a pretext for discrimination. We would not act consistently with our for discrimination.... We would not act consistently with our national policy in favor of eliminating racial discrimination in employment, if we did not allow the Plaintiff to challenge the factual validity of an employer's reasons offered to rebut a Plaintiff's prima facie case." Id at 1255-56.

This standard set forth by the Fifth Circuit has since been followed by the D.C. Circuit in Williams v. Bell, 587 F.2d 1240,1246 (D.C. Cir. 1978) and by the Tenth Circuit in Higgins v. Gates Rubber Company, 578 F.2d 281, 284 (10th Cir. 1978).

This Court's holdings in Furnco and Sweeney make the same distinction as the Court of Appeals did between "articulating (or proving) some legitimate, nondiscriminatory reason" for the conduct of the employer and in proving absence of a discriminatory motive. In Furnco, Id, S.Ct.R at 2950, this Court stated that "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." In Sweeney, the Court of Appeals stated that "in requiring the Defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." On review, this Court made the distinction, as did the Court of Appeals here, between articulating some legitimate, nondiscriminatory reason and proving absence of discriminatory motive. As the Court of Appeals held here, this distinction is not relevant in this case since the employer was not required to prove absence of discriminatory motive but merely to articulate a legitimate, nondiscriminatory reason for its conduct by legally sufficient proof.

In applying the standard here, the Court of Appeals found that regarding the transfer of the male, WATTS, the employer had articulated a legitimate, nondiscriminatory reason in that WATTS was better qualified for the job than Petitioner and that Petitioner had failed to show that this reason was pretextual. However, regarding the retention of WALZ and termination of Respondent, the Court held that the employer had simply made bald assertions that were unsupported by evidence and contrary to the other evidence to the effect that he considered the male qualified and that he followed the recommendations of others. No comparative factual data of qualifications and performance was introduced and no objective criteria for the jobs were stated. In fact, the other evidence clearly rebutted the employer's testimony. The Petitioner in its petition here has alleged that Respondent was a "troublemaker" and "incompetent." No prior allegation anywhere in this case has previously been made that Respondent was incompetent. Concerning the "troublemaker" label, as the Court of Appeals stated, no evidence was ever introduced to support this charge and, in fact, the problems in the agency of a recalcitrant staff predated Respondent's job, as evidenced by a letter from her former supervisor to the director and from Respondent to her supervisor (at 1782, Ftnote 10).

Therefore, proof of nonreliance on a discriminatory motive was not required in this case. The Petitioner was never able to articulate a legitimate, nondiscriminatory reason for its termination of Respondent and retention of WALZ. Further, the assertion by Petitioner that to require the employer to prove reliance on a legitimate, nondiscriminatory reason is the same as requiring proof of absence of a discriminatory motive is simply incorrect. For example, reliance on a legitimate, nondiscriminatory reason, such as comparative qualifications or treatment, might be shown by the employer. The burden would then shift to the Plaintiff to show that this reason was merely a pretext and that another illegitimate reason was the basis for the employer's conduct. Thus, the burden would be on the Plaintiff, as it should be, to prove discrimination by a preponderance of the evidence. The employer's proof of reliance on qualifications would be, in effect, an affirmative defense that would have to be rebutted

by the Plaintiff. The employer would not be required to prove absence of a discriminatory motive. Here, the Court of Appeals merely held that the employer had not articulated a legitimate, nondiscriminatory reason for its actions. To hold otherwise, as the Court of Appeals noted in Turner, would place the Defendant in the ludicrous position of having to prove that legitimate but fictitious reasons unsupported by the evidence were not the real reasons for the employer's conduct. Respondent respectfully submits that such a requirement is not contemplated by Title VII or this Court.

II.

Even if the Court of Appeals committed error in this case, which Respondent argues it did not, the Petition for Writ of Certiorari should nontheless be denied in that the Court clearly held that Respondent proved her charge of discrimination by a preponderance of the evidence while Petitioner failed to rebut this proof. Therefore, the Court concluded, in effect, that Petitioner prevailed on the ultimate issue of discrimination by a preponderance of the evidence. Thus, the issue of the shifting burden of proof is immaterial to the ultimate factual and legal finding of discrimination. The error of law, if one exists, is harmless. Therefore, if this Court grants the Petition, it is, in effect, agreeing to decide an ultimate issue of fact. Respondent respectfully submits that this Court should not concern itself with issues of fact.

III.

Further, even if the Court finds that an error of law was committed by the Court of Appeals, it should not grant the Petition on the basis that the Court of Appeals correctly decided the case under the existing law at that time as set forth in Turner, Supra. Turner has since been followed in numerous cases. If there has been a change in the law overruling the doctrine of Turner, such change would have to be applied retroactively to require reversal here. Respondent submits that under the doctrine of Chevron Oil Company v. Huson, 404 U.S. 97 (1971), that any such change should not be applied retroactively so as to effectively deny Respondent of a legal remedy.

IV.

Petitioner asserts a conflict between circuits on whether a finding of discrimination should be reviewed under the clearly erroneous standard as urged by Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), cert. denied, _____U.S._____, 100 S.Ct. 733 (1980), or whether a finding of discrimination is both an ultimate finding of fact and law that can be reviewed independently of the clearly erroneous standard as stated in Causey v. Ford Motor Company, 516 F.2d 416 (5th Cir. 1975), and Stewart v. General Motors Corporation, 542 F.2d 445 (7th Cir. 1976), cert. denied 433 U.S. 919 (1977).

In Sweeney, that Court chose to follow the clearly erroneous standard. However, the Court clearly stated that "We shall look carefully,however, to detect infection from legal error, and of course the clearly erroneous standard does not shield findings that are unsupported or arbitrary." Id at 109. Therefore, Respondent submits that, even if a conflict does exist as to the proper rule to follow, that such conflict is not relevant here in that both circuits require findings that are supported by the evidence. Here, the Petitioner argues that the District Court found that the Respondent could not get along with her fellow employees and that, consequently, the program suffered and that this finding supported the ultimate finding of no discrimination. No other findings of fact are offered for review by the Petitioner.The Court of Appeals held that this finding was totally unsupported by the evidence and was, in fact, in conflict with the evidence (p. 1782). Respondent submits that even under the Sweeney standard that no error has been committed by the Court of Appeals.

Further, Respondent submits that the Court of Appeals followed the standard as previously set forth by the Fifth Circuit in Causey and East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975), a standard undisturbed by this Court to date. Even if a conflict does exist, Respondent submits that it is not applicable to this case and that it is not of such practical importance as to necessitate review by this Court. Also, see Huson, Supra.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HUBERT L. GILL
Attorney for Respondent

CERTIFICATE OF SERVICE

I, HUBERT L. GILL, Attorney for Respondent herein, do hereby certify that three (3) true and correct copies of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for Fifth Circuit have been served upon Attorneys for Petitioner by placing same in the United States mail, certified, return receipt requested, addressed to LONNY F. ZWIENER, Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 23rd day of May, 1980.

Hubert Gill
Hubert L. Gill